Filed 1/28/13 P. v. Harris CA1/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MIKEL HARRIS, Defendant and Appellant.	A131757 (San Francisco City & County Super. Ct. No. 209338)

INTRODUCTION

On May 8, 2009, defendant Mikel Harris fatally stabbed Andre Fluker in the chest during an altercation in defendant's room at the Dalt Hotel in San Francisco's Tenderloin neighborhood. Defendant was charged with second degree murder, but a jury acquitted him of that charge and involuntary manslaughter. The jury deadlocked on voluntary manslaughter. A second jury convicted defendant of voluntary manslaughter. On appeal, defendant asserts collateral estoppel foreclosed retrial on the theory that defendant killed with a subjective awareness of, and conscious disregard for, the risk of death, and the trial court misinstructed the jury on manslaughter, intoxication, and accident and misfortune. He also argues the trial court erroneously denied his new trial motion based on the prosecutor's failure to timely disclose impeaching evidence relevant to the credibility of a prosecution rebuttal witness. After careful review of the case, we affirm.

STATEMENT OF THE CASE

Defendant Mikel Harris was originally charged by information with the willful, deliberate and premeditated murder of Andre Fluker. (Pen. Code, § 187, subd. (a).)[1] The information also alleged that defendant personally used a knife in the commission of the offense. (§12022, subd. (b)(1).) Prior to trial, the prosecutor withdrew the first degree murder allegations and defendant was tried on second degree murder only. A jury acquitted defendant of second degree murder, and the lesser included offense of involuntary manslaughter. (§ 192, subd. (b).) It was unable to agree on the lesser included offense of voluntary manslaughter. (§ 192, subd. (a).)

The district attorney subsequently filed an amended information charging defendant with voluntary manslaughter and personal use of a knife. The second jury found defendant guilty as charged. The trial court sentenced defendant to a total term of seven years. Defendant timely appeals.

STATEMENT OF FACTS[2]

The Dalt Hotel is a six-story, 175-room residential hotel located at 34 Turk Street in San Francisco. On May 8, 2009, Niev Khabeiry was working as the day shift desk clerk. It was his job to sign visitors in and out, keep the daily sign-in sheet and other documents up to date, and screen people.

The Altercation

Sometime between 12:45 p.m. and 1:00 p.m. defendant, who lived on the sixth floor in room 647, called Khabeiry at the front desk. He was mumbling something to the effect of "Why is Andre here?" He sounded drunk and was "sort of ranting." After defendant hung up, Mr. Khabeiry determined from the sign-in sheet that no one had signed into defendant's room and he went to the sixth floor to investigate further. As he approached room 647, Mr. Khabeiry saw that Andre Fluker was in defendant's room, gathering his clothes and personal belongings. Defendant was sitting on his bed with a

[1] Unless otherwise indicated all further statutory citations are to the Penal Code.

[2] This factual statement summarizes only testimony that is germane to the issues raised on appeal, including prejudice.

pair of scissors in his hand. Defendant and Fluker were "having sort of an argument." Defendant called Fluker "a broke, homeless, 'N' word"; defendant sounded angry or upset. Upon leaving the room, Fluker said, "Fuck you. I'm going into a program and get my life together."

Mr. Khabeiry informed Fluker that he was there to escort Fluker out of the building and that he had to come with Khabeiry. Fluker offered no resistance, and the two men started to leave the back hallway on the sixth floor towards the main hallway and the elevators, with Fluker walking behind Khabeiry.

At some point in the main hallway, Khabeiry realized Fluker was no longer behind him. Khabeiry turned to go back to defendant's room, and he heard the sound of scuffling, as if two people were engaged in an altercation. As Khabeiry turned the corner into the back hallway, Fluker, who had been stumbling towards him, fell face down on the floor in front of him. Khabeiry called his boss downstairs and asked her to call 911.

Mr. Khabeiry stayed with Fluker. The door to defendant's room was shut. Then defendant came out of his room and walked fast past Khabeiry, with a can of beer in his hand, heading towards the elevators in the main hallway. Defendant did not stop to see how Fluker was doing or to explain what had just happened. Khabeiry could hear the sound of the garbage chute opening and closing. Paramedics soon arrived.[3]

Shortly after 3:00 p.m. on May 8, a police officer saw defendant walking on Jones Street across the street from the Tenderloin police station. Since he matched the description of the homicide suspect, the officer detained him and took him into the station. Defendant appeared to be under the influence of something.

The Autopsy Findings

Andre Fluker was 41 years old, 5 feet 10 inches tall and weighed 206 pounds. Cocaine was found in his urine.

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[3] Video footage of the sixth floor back hallway for May 8, 2009 was shown to the jury during Mr. Khabeiry's testimony. It showed defendant, Fluker, and Khabeiry arriving at different times; Andre Fluker falling at 12:59:05; defendant departing his room at 1:01:18; and the paramedics arriving at 1:08:18.

The cause of Andre Fluker's death was a stab wound to the chest, penetrating the sternum, and going through the aorta to the soft tissue between the aorta and the spinal column. There were no knife marks on the spinal column. The knife essentially went straight in, at a 90-degree angle. The injury was consistent with being stabbed with a kitchen knife, but not with scissors.

Defendant's Statement to Police

Defendant gave a *Mirandized*[4] statement to San Francisco Police Department homicide detectives Michael Johnson and Maureen D'Amico starting at 5:00 or 6:00 in the evening of May 8 at the Hall of Justice.[5] He said that Andre Fluker had shown up at his door unannounced. Fluker was angry, although defendant did not know why. Fluker said he wanted to smoke some crack. Defendant knew "[h]e was up to sneakery. He was up to no good. . . . [¶] But he was very intimidating. . . ." Fluker was "big" and "well built" while defendant was "very, very slim."[6]

Defendant didn't know how Fluker had gotten into the building. Visitors are supposed to go to the front desk and show their California I.D., but Fluker didn't have a California I.D. Defendant assumed Fluker "snuck in the building." He called the desk clerk for assistance in getting Fluker to leave. Fluker said, "[D]on't call downstairs . . . [b]ecause I don't want to be on the 86 list." Defendant had been storing some of Fluker's belongings in his room. When Fluker came in, he was very rude, and defendant told Fluker, "Just take all your stuff and go." Instead, Fluker slapped defendant in the face.

At this point, the desk clerk showed up and escorted Fluker out, but Fluker returned and shoved defendant in the chest. At the time, defendant was "cutting on some garlic" with a knife. Fluker "slapped the phone out of my hand, in my face." He slapped defendant "a second time and I had the knife and he slapped the knife out of his . . . and I

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[4] *Miranda v. Arizona* (1966) 384 U.S. 436.

[5] An audio tape of the statement was played for the jury. A transcript of the tape was also provided to them.

[6] Defendant was five feet nine inches tall and weighed 150 pounds at the time of his arrest.

just grabbed it I know what I did, I did." "My reaction was [unintelligible] . . . I, I . . . cut him." "It just went a reflex." Defendant did not know where the knife landed or what part of Fluker's body was cut. Afterwards, he "got up," left, and shut his door. He put on mismatched tennis shoes. Fluker was standing outside defendant's door. Defendant left the building to get some air. The next thing he knew, there were "tons of police and . . . paramedics." He did not know what he did with the knife, and did not remember throwing it in the garbage chute, but admitted that he probably did so.

Defendant had known Fluker for a year or two. Defendant had been homeless before and was trying to help Fluker out. He would visit Fluker and put money on his books when he was in jail. He let Fluker stay in his room, but Fluker would eat up all his food. Defendant had taken in Fluker's personal belongings and contacted Fluker's mother while Fluker was in jail. But Fluker had been out of jail for two weeks, and defendant was feeling Fluker was taking advantage of him. "I really wanted him to get his shit and get out. You know, into a drug program."

Defendant had never before argued with Fluker or had a disagreement with him. This was the first time that Fluker had ever been violent with him. Fluker "was really nice. He was [unintelligible]. We was like brothers." It was out of character for Fluker to act the way he had that day.

That day, defendant commenced drinking Olde English beers at 3:00 a.m. and had drunk three or four 24-ounce cans of them by 10:00 a.m. He had not drunk anything more between 10:00 a.m. and the altercation. Twice defendant stated, "I wasn't drunk." "He just made me mad." Although defendant was prescribed several prescription antipsychotic drugs, he did not take them that day because he was drinking.

He expressed surprise when the police told him Fluker had died and was upset at the news. He did not intend to kill Fluker.

Additional Forensic Evidence

Officers who searched defendant's room found two kitchen knives on the floor in the room, but no garlic or cutting board. Three more knives were found in various places. A knife with a six and one-half inch blade and reddish stains was recovered from

the garbage area in the basement. The blood on the knife matched Fluker's genetic profile. Fluker's DNA was also found in the swabs of blood taken from the scene of the crime.

It was stipulated at trial that "[a] preliminary alcohol screening device was administered to [defendant] on May 8, 2009, at 15:41 hours [i.e., 3:41 p.m.] and the result[] . . . was that it was .259." A blood test administered at 5:48 p.m. showed defendant had a blood-alcohol level of .21. Blood tests for "common drugs of abuse" (amphetamines, barbiturates, benzodiazepines, cannabinoids, cocaine, methadone, opiates, and PCP) were negative. An expert opined that if a 160-pound African-American male with an average elimination rate drank four 24-ounce cans of Olde English beer between 3:00 a.m. and 10:00 a.m., his blood-alcohol level at 1:00 p.m. would be .13. However, a chronic alcoholic with an elevated elimination rated would have a blood-alcohol level of zero. To have attained a blood-alcohol level of .25 at 3:41 p.m. and .21 at 5:48 p.m., that individual would have had to consume alcohol after 1:00 p.m. However, if a chronically alcoholic African-American man weighing 160 pounds with those blood-alcohol levels at 3:41 and 5:45 p.m. had stopped drinking at 12 noon, his blood-alcohol level at 1:00 p.m. would have been .37.

Defense Case

Carita McKinley was on the phone with defendant on May 8, 2009, when she heard loud banging, as if somebody were trying to get in. She asked him, "Who is that?" Defendant said, "I don't know hold on." He came back to the phone and said, "It's Andre." She knew Andre Fluker. She heard what sounded like an argument, and heard defendant say, "Don't come in here. Stop touching my things." Defendant said to McKinley, " '[T]weety I'm about to'—and then it was like nothing." Prior to the silence, she heard a sound like wrestling.

Before this incident, defendant told McKinley Fluker "was using intimidation to get what he wanted from him and he was afraid of him." Defendant felt Fluker was taking advantage of his hospitality—spending too many nights in defendant's room, eating his food, bringing other people into the room—and he was "tired of it." McKinley

admitted that on occasion defendant had been hostile, aggressive or disrespectful towards her.

On May 8, 2009, the social worker at the Dalt Hotel called Jimmy Detels, defendant's peer counselor from the Tenderloin outpatient clinic, and asked him to come to the hotel immediately because there had been an incident. While Detels was on his way there with a coworker, he learned the incident involved defendant, and Detels called defendant on his cell phone at 1:30 or 2:00 p.m. Defendant was hysterical and said, "[T]his guy I tried to get him out of my room. I called the front desk. They were escorting him out. He came back. There was an altercation. I stabbed him, I think, and he's laying in the hallway, and I think I hurt him really bad." Detels told defendant he had to turn himself in. Defendant responded, "I don't know what to do; I'm just really scared; I don't know what to do." He then hung up.

On May 26, 2009, a defense investigator went inside defendant's room at the hotel. It was still sealed. He found and photographed some garlic on the floor between the bed and the couch.

The defense called numerous witnesses to testify about Fluker's violent character. Front desk clerk Lajuana Ceasar put Andre Fluker on the "86 list"[7] at defendant's request on January 22, 2009. Defendant told her that "he [no] longer wanted to see Mr. Fluker because he was violent and trying to control his life." The "86 list" is a list of people who are banned from the Dalt Hotel for violating "house rules." Ms. Ceasar had known defendant since he started living at the Dalt Hotel. On a few occasions, Fluker had come to the hotel to visit Harris and she had not let him in. When this occurred, Fluker became upset and angry.

Ms. Ceasar had seen Fluker "snatch and pull" on defendant during an argument they had outside the hotel. Defendant would not fight back. Ms. Ceasar's personal opinion is that Fluker was a violent person. Fluker had a reputation in the Tenderloin for being a violent person "based on him controlling and demanding things and putting hands

[7] This list itself was admitted into evidence over defense objection.

on." She had also heard Fluker was violent from defendant and others. She had heard Fluker threaten defendant. She had also seen them hanging out together and being very friendly.

San Francisco Police Officer Stephen Smalley responded to a robbery call from a woman who lived in a Tenderloin apartment in February of 2006. She told him Andre Fluker had grabbed her by the neck, lifted her off the floor and held a knife to her throat. He then took money off her bed and left. Smalley believed the woman was telling the truth about the incident.

San Francisco Police Officer Maureen Barron was called to testify about two domestic violence incidents involving Vickie Maltbia. However, much of Barron's testimony was stricken—including her identification of Fluker as the suspect—because she had no independent memory of the incident and could only testify from her police report. [8] The first page only of the "Officer's Observations" section of her police report was admitted into evidence as defense exhibit 592A. That page included observations of Ms. Maltbia's injuries, and a statement that she repeatedly refused treatment, but it contained no information about the suspect.

Michel Bordeaux's girlfriend is Vickie Maltbia. He had many fights with Fluker. In one particular altercation, Fluker beat him so badly that Bordeaux had to be hospitalized. Fluker started the fight when he tried to get into Bordeaux's hotel room by kicking in the door. Bordeaux told Fluker to leave, but Fluker kept on hitting him. Bordeaux is five feet one inch tall and weighs 130 pounds.

A few weeks earlier, Bordeaux had stabbed Fluker with a metal shard when he came to the rescue of Maltbia, because Fluker was lifting her off the ground by the neck. Bordeaux went to jail and to trial in that case and was acquitted by a jury. One time, a

[8] At the close of instruction, the court told the jury that "the People's motion to strike Officer Barron's testimony . . . was granted in part and denied in part. So if you wish, during your deliberations, you may request that the court reporter read back Officer Barron's testimony and she will read to you only the portion of the testimony that remains in the record." So far as the record shows, the jury did not request read back of Barron's testimony.

long time ago, Fluker used a gun in front of him. Another time, also a long time ago, Fluker used a camping knife. Bordeaux and Fluker got into fights because Fluker wanted Maltbia. Bordeaux had never met defendant in his life and knew of no reason why defendant would know anything about Bordeaux's fights with Fluker.[9]

The defense also called two police officers who detained Fluker for trespassing at a hotel on Mission Street in San Francisco.

The defense called one witness to testify to defendant's good character. Defendant's older brother opined that defendant was "no way" a violent person and "would never just provoke a fight or cause a fight with anyone." He was not aware that (1) defendant struck a person on the head with a broken bottle in January of 2008; (2) punched a nurse in the chest with his fist in April of 2006; (3) threatened a security guard with a knife in February of 2006; (4) bit a person on the leg in April of 2004; (5) punched that same person in the eye; or (6) hit another person in the face with a chair in October of 1998. None of these incidents changed his opinion of defendant as a peaceful man.

Rebuttal

Patrick Bellemare lived in a room downstairs from defendant. On December 20, 2008, defendant forced his way into Bellemare's room through the front door which was open a crack for ventilation. Defendant complained that Bellemare's stereo was too loud. Bellemare, who is four feet five inches tall and weighs 120 pounds, barely pushed defendant out of the room. Defendant swung wildly at Bellemare's head with the arm that was still sticking through the door. Bellemare was "[s]cared for [his] life." After managing to shut the door, Bellemare called 911.

On June 27, 2008, a police officer acting as a decoy in a robbery abatement operation posed as an intoxicated person with $35 in his breast pocket, an open beer can in a brown bag, and a pack of cigarettes in his hand. Defendant walked past him, then stopped, turned around and walked back. He stood in front of the officer and demanded a

[9] The prosecution called the two officers who detained Bordeaux for stabbing Fluker.

cigarette. Defendant pushed his hand into the officer's breast pocket and threw the officer against a cement wall about two feet away. Defendant made a fist as if he were going to punch the officer, took the money, and started to walk away. He was arrested by other officers nearby.

Sharon Bonnett was working a four-hour shift, from 10:00 a.m. to 2:00 p.m., as a desk clerk at the Dalt Hotel on May 8, 2009. At 11:30 or 11:45 a.m., shortly before she took her lunch break, Andre Fluker came to the front desk and asked her to call defendant. She called defendant's room, but he did not answer. As she hung up, she saw defendant coming up the back stairs. He had been downstairs serving Mother's Day brunch.

She overheard defendant say to Fluker, "What are you doing here? I 86ed you[.]"[10] Defendant also said, "I don't want you in here you 86ed." "I put you on the 86 list. I don't want you in my room." Bonnett heard defendant say, "I'm not holding your coat. Do you have a dollar [?]" Fluker had a coat, which he gave to defendant along with a dollar. After that transaction, Bonnett started attending to other customers. She did not see how Fluker and defendant parted. She did not recall defendant's demeanor or tone of voice. Bonnett recalled that she went to lunch around 12:15 or 12:30 p.m. When she returned, at 12:50 p.m., Mr. Khabeiry was at the desk. "He got a phone call. He said I got to go upstairs to Mr. Harris' unit. I said okay."

On direct examination, Ms. Bonnett was asked by the prosecutor if she had been convicted of narcotics offenses in the early 1990's. She admitted she "[m]ost definitely was." The prosecutor then asked her, "Have you changed as a person since then?" Bonnett explained, "Yes, I have been working since. That was May 96. . . . Went to jail for five months 20 days. Got out November 8, 96, and I been working ever since. Back in February of last year, I got into a conflict with my son. [¶] . . . [¶] Actually, what happened it was my son's father. He had something of mine. He wouldn't give it back.

[10] Bonnett explained that "[i]f you have no valid CA state ID . . . or if you are 86 list[ed] . . . you can't enter the building."

I got in trouble. They say I robbed him. But he had my [pay]check, so I went to jail for five days and that was that." She was not convicted.

Surrebuttal

The former general manager of the Dalt Hotel frequently received complaints from Patrick Bellemare about trivial matters. Bellemare regularly wrote that various tenants and other people were out to harm him. These complaints proved to be untrue. Other tenants complained that Bellemare's music or television were too loud. She investigated each incident report, and she did not recall investigating an incident report of defendant pushing his way into Bellemare's room and swinging at him on December 20, 2008.

DISCUSSION

Collateral Estoppel Does Not Apply Here.

As he did in the trial court, defendant asserts on appeal that "instructing the jury on the manslaughter theory that [he] had acted in conscious disregard for human life violated [his] Fifth Amendment right not to be placed in double jeopardy, because the acquittals at the first trial precluded reliance on that theory." Relying primarily on *Ashe v. Swenson* (1970) 397 U.S. 436 (*Ashe*) and *Yeager v. United States* (2009) 557 U.S. 110 (*Yeager*), defendant argues in essence that the principle of collateral estoppel[11] embodied in the Double Jeopardy Clause should have prevented the prosecution from asking the second jury to consider whether defendant killed Fluker with conscious disregard for life (as opposed to the intent to kill), because that issue was necessarily decided in defendant's favor by the first jury's acquittals of second degree murder and involuntary manslaughter. Since the prosecutor eschewed a theory of manslaughter premised on the

[11] "The doctrine of collateral estoppel is one aspect of the concept of res judicata. In modern usage, however, the two terms have distinct meanings. The Restatement Second of Judgments, for example, describes collateral estoppel as 'issue preclusion' and res judicata as 'claim preclusion.' " (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341, fn. 3. See also *People v. Quarterman* (2012) 202 Cal.App.4th 1280, 1288.)

intent to kill in the second trial,[12] for all practical purposes defendant's argument, if successful, would preclude any prosecution at all. For the reasons discussed below, we disagree with defendant's premise and reject his argument on its merits.

At the outset, we also reject the Attorney General's contention defendant forfeited his double jeopardy argument by failing to enter a plea of former jeopardy to the amended information charging voluntary manslaughter. In our view, a plea of former jeopardy would not have made sense here. Where a jury deadlocks and a mistrial is declared, there is no former jeopardy because "the second trial does not place the defendant in jeopardy 'twice.' [Citations.] Instead, a jury's inability to reach a decision is the kind of 'manifest necessity' that permits the declaration of a mistrial and the continuation of the initial jeopardy that commenced when the jury was first impaneled." (*Yeager, supra*, 557 U.S. at p. 118.) Here, defendant's motion to preclude litigation on a discrete issue implicitly acknowledged he could be retried on the deadlocked charge of voluntary manslaughter. If " ' "[t]he purpose of the general doctrine of waiver is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had . . . ." ' " (*People v. Saunders* (1993) 5 Cal.4th 580, 590), then defendant's motion accomplished that purpose. No waiver or forfeiture occurred. (*Id.* at p. 592.) We, therefore, turn to the merits of defendant's claim.

The Fifth Amendment to the United States Constitution (applicable to the states through the Fourteenth Amendment) provides in relevant part: "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ." (U.S. Const., 5th Amend.; *Benton v. Maryland* (1969) 395 U.S. 784, 794.)[13] In *Ashe, supra*, the United States Supreme Court declared that collateral estoppel applies in criminal

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[12] In closing argument the prosecutor told the jury he was not asking the jury to consider an intent to kill theory, and the court's manslaughter instruction (CALCRIM No. 572) did not include intent to kill.

[13] Article I, section 15, of the California Constitution similarly provides: "Persons may not twice be put in jeopardy for the same offense . . . ."

cases and "is embodied in the Fifth Amendment guarantee against double jeopardy." (*Ashe, supra*, 397 U.S. at p. 445.) " 'Collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." (*Id*. at p. 443.) "[T]he rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." (*Id*. at p. 444.) "Traditionally, we have applied the doctrine only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. [Citations]. The party asserting collateral estoppel bears the burden of establishing these requirements." (*Lucido v. Superior Court, supra,* 51 Cal.3d at p. 341.)

In *Yeager,* the high court recently settled two areas of disagreement in double jeopardy jurisprudence, both of which are relevant here. First, on its facts, the *Yeager* court settled that collateral estoppel applies in the retrial of the same case after a mistrial. (*Yeager, supra,* 557 U.S. at pp. 115, 118–119.) Second, *Yeager* held that "for double jeopardy purposes, the jury's inability to reach a verdict on [some] counts was a nonevent" that is not a relevant to the "preclusion inquiry" and plays no part in the analysis of a collateral estoppel claim. (*Id.* at pp. 120–121.)

The *Yeager* court also reaffirmed *Ashe*'s holding that where a previous judgment of acquittal is based on a general verdict, "[t]o decipher what a jury has *necessarily decided*, . . . courts should 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' [Citation.] [T]he inquiry 'must be set

in a practical frame and viewed with an eye to all the circumstances of the proceedings.' " (*Yeager, supra*, 557 U.S. at pp. 119–120, italics added, quoting from *Ashe, supra,* 397 U.S. at p. 444.)

Here, defendant's claim fails because he cannot show that the issue he sought to foreclose in his second trial—whether he killed Fluker with the conscious disregard for human life—is either identical to the issue decided in his first trial, or was necessarily decided in the prior trial. With respect to the murder acquittal, defendant actually concedes that "[p]erhaps the jury's verdict acquitting [defendant] of *murder* does not compel a finding that they unanimously found he had not acted with conscious disregard for human life. The jurors could have unanimously agreed that the crime could be no more than manslaughter because provocation had been so amply shown . . . ."[14]

Based on our examination of the record of the first trial, taking into account the pleadings, evidence, charge, and other relevant matter, we conclude a rational jury could have grounded its verdict of not guilty of murder upon an issue—the lack of malice, due to the existence of provocation and/or heat of passion, or imperfect self-defense—other than the nonexistence of a conscious disregard for life. Murder requires malice, whether express (intent to kill) or implied (conscious disregard). Adequate provocation, or imperfect self-defense, negate malice and reduce the offense to manslaughter. Inasmuch as both provocation and imperfect self-defense (along with traditional self-defense and accident) were central issues litigated in the first trial and upon which the court instructed, the acquittal of murder cannot establish that the first jury necessarily decided defendant did not act with conscious disregard for life when he stabbed Fluker.

With respect to the involuntary manslaughter acquittal, defendant's argument rests on the premise that implied malice " 'contemplates a subjective awareness of a higher degree of risk than does gross negligence, and involves an element of wantonness which

[14] Although defendant emphasizes jury unanimity, in fact "California does not require the individual jurors to choose a particular theory of murder beyond a reasonable doubt, 'so long as each is convinced of guilt.' " (*Santamaria v. Horsely* (1998) 133 F.3d 1242, 1246, quoting from *People v. Santamaria* (1994) 8 Cal.4th 903, 919.)

is absent in gross negligence.' " (*People v. Butler* (2010) 187 Cal.App.4th 998, 1009, fn. 5 (*Butler*).) He reasons from this premise that the first jury's "decision to acquit [defendant] of involuntary manslaughter can only be based on a finding that his actions did not show criminal negligence; *a fortiori*, he cannot have had the [greater] mental state of conscious disregard for human life . . . ." Defendant argues that by definition "criminal negligence, which was the only mental state required for involuntary manslaughter, is 'aggravated, culpable, gross, or reckless' conduct that is incompatible with a proper regard for human life, or in other words, 'a disregard for human life or an indifference to consequences.' " (*Id.* at p. 1008, quoting from *People v. Penny* (1955) 44 Cal.2d 861, 879.)

We disagree with defendant's logic. Involuntary manslaughter is not a lesser included offense of voluntary manslaughter (*People v. Orr* (1994) 22 Cal.App.4th 780, 784 (*Orr*)), and criminal negligence is not a "lesser included mental state" of implied malice. For that reason, it does not follow that acquittal of the lesser offense of involuntary manslaughter precludes conviction for the greater offense of voluntary manslaughter.

One of the two intent elements that satisfy the *mens rea* requirement for voluntary manslaughter (as well as murder) is the conscious disregard for life. Although the intent element for involuntary manslaughter is described in similar-sounding language, it relates to a disparate mental state: indifference to life, i.e., criminal negligence. As explained in *Butler, supra*, 187 Cal.App.4th 998, "[b]oth murder (based on implied malice) and involuntary manslaughter involve a disregard for life; however, for murder the disregard is judged by a subjective standard whereas for involuntary manslaughter the disregard is judged by an objective standard. [Citations.] Implied malice murder requires a defendant's conscious disregard for life, meaning that the defendant subjectively appreciated the risk involved. [Citation.] In contrast, involuntary manslaughter merely requires a showing that a reasonable person would have been aware of the risk." (*Id*. at p. 1008.) Thus, assuming a hypothetical jury's acquittal of involuntary manslaughter in a murder case means it impliedly found that a reasonable person would not have been

aware of the risk to life posed by brandishing a knife or raising a hand holding a knife, that same hypothetical jury could also have found that the defendant either intended to kill, or subjectively appreciated the risk that he might kill a man if he stabbed him mid-chest, and consciously disregarded that risk, but that the intent was mitigated (i.e., negated) by heat of passion or imperfect self-defense.

Voluntary and involuntary manslaughter also raise different factual and legal issues with respect to the *actus reus* of each crime. As explained in *Orr,* the "unlawful act" at issue in voluntary manslaughter is not the same as the unlawful act at issue in involuntary manslaughter. "[I]n order to convict a person of voluntary manslaughter, the jury must find that the killing was intended and was *unlawful* in that it was *neither justifiable,* that is, did not constitute lawful defense of self, others, or property, prevention of a felony, or preservation of the peace (§ 197 [fn. omitted]); *nor excusable,* that is, the killing did not result from a lawful act done by lawful means with ordinary caution and a lawful intent, and did not result from accident and misfortune under very specific circumstances, including that no dangerous weapon was used (§ 195 [fn. omitted])." (*Orr, supra,* 22 Cal.App.4th at p. 784.) This is also true of the unlawful act required for murder. (See CALCRIM No. 500 ["Homicide: General Principles"].) However, "in order to convict a person of involuntary manslaughter, the jury must find that the killing was *unlawful* in that it occurred in the commission of an ordinarily lawful act which inherently involved a high degree of risk of death or great bodily harm and was accomplished in a criminally negligent manner. The definition of *unlawful* as an element of involuntary manslaughter differs significantly from that of voluntary manslaughter [or murder] and requires the trier of fact to make substantially different findings." (*Orr, supra,* at p. 784.)

Turning now to the actual instructions given in this case, we find the first jury was instructed that "defendant acted with implied malice if: 1. He intentionally committed an act; 2. The natural and probable consequences of the act were dangerous to human life; 3. At the time he acted, he knew his act was dangerous to human life; AND 4. He

deliberately acted with conscious disregard for human life." (CALCRIM No. 520 ["First or Second Degree Murder With Malice Aforethought (Pen. Code, § 187")].)

The instructions to the jury also defined involuntary manslaughter as "[a]n unlawful killing resulting from a willful act committed without a intent to kill and without a conscious disregard of the risk to human life" when his or her act unlawfully caused a death by (1) committing a misdemeanor—here, brandishing a knife—that posed a high risk of death or great bodily injury because of the way it was committed; *or* (2) committing a lawful act—here, raising his hand with a knife—with criminal negligence.[15]

Criminal negligence was defined as "involv[ing] more than ordinary carelessness, inattention or mistake in judgment," as when he "acts in a reckless way that creates a high risk of death or great bodily injury; and "[a] reasonable person would have known that acting in that way would create such a risk. In other words, a person acts with criminal negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act." (CALCRIM No. 580 ["Involuntary Manslaughter: Lesser Included Offense"].)

Complicating matters, however, were incorrect instructions, given over the prosecutor's objections. A defense-devised instruction, denoted as 571a, informed the jury that "[a] killing that would otherwise be murder *is reduced to involuntary manslaughter* if the defendant killed someone because he acted in imperfect self defense and without conscious disregard of human life. . . . [¶] The difference between voluntary manslaughter and involuntary manslaughter depends on whether the defendant acted with a conscious disregard of human life." (Italics added.) [16] The jury was also correctly

[15] The jury was not instructed on a third, nonstatutory, variety of involuntary manslaughter based upon the commission of a noninherently dangerous felony with criminal negligence. (*Butler, supra*, 187 Cal.App.4th at p. 1007.)

[16] The conclusion in *People v. Blakeley* (2000) 23 Cal.4th 82, 91, that "a defendant who, *with the intent to kill or with conscious disregard for life*, unlawfully kills in

instructed with CALCRIM No. 571**,** which informed the jury that "[a] killing that would otherwise be murder *is reduced to voluntary manslaughter* if the defendant killed someone because he acted in imperfect self defense." (Italics added.)

As defense counsel argued in a memorandum of points and authorities in support of instruction CALCRIM No. 571a, "[t]he jury may find that Mr. Harris was in his room cutting garlic with the knife when Mr. Fluker unlawfully reentered his room and hit him. They may further find that in that fleeting moment Mr. Harris acted in unreasonable self-defense because he was in threat of serious bodily injury and unintentionally cut Mr. Fluker without a conscious disregard for human life. [¶] The evidence presented at trial could lead the jury to make the reasonable finding that Mikel Harris' conduct in reflexively defending himself with a knife already in his hand was *not* an act with either intent to kill or a conscious disregard for life. The jury could easily come to this conclusion based upon Mr. Harris' statement to the police that he was hit and then cut [Mr. Fluker] in a reflex. Moreover, the jury could find that Mikel Harris did not act with a conscious disregard for human life because the knife was already in his hand, he was mildly intoxicated and it is reasonable to assume that he acted without the knowledge the knife was in this hand." (Original italics.)

Under these instructions, it appears the jury could not convict—or acquit—defendant of involuntary manslaughter *unless* it first believed defendant acted in imperfect self-defense, which negates implied malice (i.e., conscious disregard). Either way, the absence of malice *was a given*, if imperfect self-defense existed. But to *acquit* defendant of involuntary manslaughter under these instructions, the jury had to find the nonexistence of a misdemeanor, or the nonexistence of a lawful act performed in an

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unreasonable self defense is guilty of voluntary manslaughter," (original italics) constituted a change in the law that was to be applied prospectively only to offenses occurring after Blakeley's June 2, 2000 offense. (*Id.* at p. 92.) As the related issues section of the bench notes to CALCRIM No. 571 states, under prior law, an unintentional killing in imperfect self-defense was involuntary manslaughter, and if the offense occurred before that date, instruction with prior law was required. (See 1 Judicial Council of Cal., Crim. Jury Instns. (2012) Related Issues to CALCRIM No. 571, p. 365.)

unlawful manner, or the absence of criminal negligence. Under the peculiar circumstances of this case, the jury's acquittal verdict on involuntary manslaughter may reflect a decision that some jurors viewed defendant's conduct as *more* serious than the conduct described by the elements of involuntary manslaughter. Thus, some jurors may even have decided that defendant did not merely brandish a knife, or merely raise his hand while holding a knife, in a grossly negligent manner. Still other jurors may have believed he did so, but only in self-defense.[17] To return a verdict of not guilty, all jurors must have concluded that whatever the crime defendant committed, if any, it was not involuntary manslaughter. The general verdict does not reveal which avenue or avenues the jurors took, but it does suggest that none of the possible paths to acquittal necessarily involved a finding defendant was not subjectively aware that his conduct involved the risk of death or great bodily injury, and his conscious disregard of that risk. In light of the contradictory instructions, the various possible exonerating factual findings on which the jury could have rested its verdict, and the multiplicity of possible verdicts, it is impossible to conclude that the one, identical issue necessarily decided by the first jury in acquitting defendant of involuntary manslaughter was that he acted without a conscious disregard for human life. Defendant has failed to carry his burden of showing that a rational jury could not have grounded its verdict upon an issue other than the one defendant seeks to foreclose from consideration. Consequently, collateral estoppel does not apply.

The Trial Court Did Not Misinstruct on Intoxication.

Defendant argues that Penal Code section 22 "is silent on the question of whether evidence of intoxication may be considered in cases where malice aforethought is absent," and that it must be interpreted to allow jury consideration of the effect of voluntary intoxication on the formation of the conscious disregard required for voluntary manslaughter. He argues that the intoxication instruction given here prejudiced his case,

[17] The jury was instructed that brandishing a weapon is not a crime if it was done in self-defense.

because it prevented a reasonable jury from considering whether, "due in large part to the effects of alcohol," he did not know he was going to stab Fluker and did not act in conscious disregard of human life.

Over defense counsel's objection,[18] the trial court instructed the jury on intoxication in accordance with CALCRIM No. 625 ("Voluntary Intoxication: Effects on Homicide Crimes (Pen. Code, § 22)").[19] CALCRIM No. 625 is based on Penal Code section 22, of which subdivision (b) states: "Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, *when charged with murder*, whether the defendant premeditated, deliberated, or harbored *express* malice aforethought." (Italics added.) In *People v. Mendoza* (1998) 18 Cal.4th 1114 (*Mendoza*), our Supreme Court reviewed the history of amendments to section 22 and concluded that the amendment which gave section 22 its present language abrogated the court's holding, in *People v. Whitfield* (1994) 7 Cal.4th 437 (*Whitfield*), " 'that section 22 was not intended, in murder prosecutions, to preclude consideration of evidence of voluntary intoxication on the issue whether a defendant harbored malice aforethought, whether the prosecution proceeds on a theory that malice

[18] Defense counsel objected that the instruction would be confusing to the jury, especially because she offered no evidence that defendant was intoxicated at the time of offense. "I have never argued and never will be arguing that my client was intoxicated at the time of the incident. And I think to give this to them it's entirely confusing. She agreed there was evidence that defendant had a blood-alcohol level of .37—"basically almost dead"—at the time of the incident, but maintained that "since we have the hindsight of the first trial, I in fact know they were confused. They had no idea how to deal with this intoxication. They basically just ignored it. [¶] I'm not quite sure what the point is since it's certainly not a defense, never has been, so I'm objecting to it. I do not think it applies."

[19] The court instructed, in relevant part: "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill, or the defendant was unconscious when he acted. [¶] A person is *voluntarily intoxicated* if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. [¶] You may not consider evidence of voluntary intoxication for any other purpose." (Original italics.)

was express or implied.' " (*Mendoza*, *supra*, 18 Cal.4th at p. 1125, quoting from *Whitfield*, *supra*, 7 Cal.4th at p. 451.) *Whitfield* involved the question whether intoxication could negate implied malice (i.e., subjective awareness and conscious disregard) in a prosecution for murder stemming from a fatal drunk driving collision.

Despite defense counsel's objection below, and her assertion that defendant was *not* relying on an intoxication defense, on appeal defendant argues, nonetheless, that an intoxication instruction *should* have been given that permitted the jury to consider defendant's intoxication on the question whether he was subjectively aware of the risk of death posed by his actions, and consciously disregarded that risk. The failure to so instruct, he charges, denied him due process of law under the Fifth and Fourteenth Amendments to the United States Constitution. We reject defendant's claims for several reasons.

First, defendant cannot now argue that the trial court erred by *not* giving a modified instruction on intoxication and conscious disregard, when he objected below to *any* intoxication instruction, for the stated reason that intoxication was not his defense and would merely confuse the jury. In our view, any such error was either forfeited (*People .v Cole* (2004) 33 Cal.4th 1158, 1211) or invited. (*People v. Seaton* (2001) 26 Cal.4th 598, 668.)

In his reply brief, defendant switches gears and argues the issue is not waived because "the court should have given no instruction at all." Without the instruction, he argues, the jury would have been free to consider evidence of intoxication on any issue it pleased, including conscious disregard, and the error is that the instruction as given "forbade the jurors from considering intoxication on any issue other than intent to kill."

We reject defendant's arguments for the following reasons. There was sufficient evidence presented from which the jury could have inferred that defendant was intoxicated at the time of the assault, even though defendant did not rely on intoxication as a defense. Thus, the court correctly granted the prosecution request for an instruction to guide the jury's consideration of that evidence, instead of leaving the jury to evaluate that evidence in a manner of its own devising.

Because intoxication is not a defense to a crime, intoxication evidence "is proffered in an attempt to raise a doubt on an element of a crime which the prosecution must prove beyond a reasonable doubt. In such a case, the defendant is attempting to relate his evidence of intoxication to an element of the crime." (*People v. Saille* (1991) 54 Cal.3d 1103, 1120.) An instruction relating intoxication to some required mental state is such a "pinpoint" instruction. (*Id.* at p. 1119.) "The trial court is not required to give such an instruction on its own initiative, and if the instruction as given is adequate, the trial court is under no obligation to amplify or explain in the absence of a request that it do so." (*People v. Mayfield* (1997) 14 Cal.4th 668, 778.)

Defendant could have asked the court to modify the instruction along the lines he argues on appeal: that section 22 is "silent" as to whether intoxication evidence can negate or rebut conscious disregard/implied malice in a voluntary manslaughter prosecution when murder is not charged and, therefore, does not forbid it. Absent such a request, the trial court was under no obligation to consider altering the standard CALCRIM instruction, and we are under no concomitant obligation to consider the argument on its merits. "Defendant did not ask the trial court to clarify or amplify the instruction. Thus, he may not complain on appeal that the instruction was incomplete." (*People v. Cole, supra*, 33 Cal.4th 1158, 1211.)

In any event, defendant's argument lacks merit. CALCRIM No. 625 correctly reflects the strictures of section 22, as that section has been interpreted by our Supreme Court in *Mendoza, supra*, 18 Cal.4th 1114 [evidence of voluntary intoxication cannot negate implied malice required for murder], and *People v. Atkins* (2001) 25 Cal.4th 76 (*Atkins*) [evidence of voluntary intoxication cannot negate general criminal intent required for arson]. We do not find compelling defendant's argument that section 22 is "silent" on implied malice in a voluntary manslaughter prosecution, and that it is "illogical" to infer from *Mendoza* and *Atkins* that evidence of voluntary intoxication cannot negate the "implied malice" prong of criminal intent when voluntary manslaughter is charged and tried on its own, without murder. The reasoning of *Mendoza* and *Atkins* persuade us that whether "implied malice manslaughter" is a general

or specific intent crime, section 22 does not permit intoxication evidence to be used to negate that intent and thereby create a complete defense to manslaughter.

Furthermore, we agree with the reasoning of *People v. Timms* (2007) 151 Cal.App.4th 1292 (*Timms*) and find it dispositive here. In *Timms*, as in this case, the defendant argued that "application of section 22 to his case, through [CALCRIM No. 625] violates his due process right because the effect is to exclude relevant evidence on the issue of whether he harbored a 'conscious disregard' for life." (*Timms, supra*, at p. 1298.) Because Timms was acquitted of second degree murder, but convicted of voluntary manslaughter (in one trial), "there is no issue concerning implied malice. However . . . the mental requirement for unintentional voluntary manslaughter as explicated in *People v. Lasko* [2000] 23 Cal.4th 101 and the definition of implied malice both share the concept of conscious disregard for life. Thus, [Timms's] complaint is that the court should have instructed the jury that it could consider voluntary intoxication when determining whether he acted with conscious disregard." (*Timms, supra,* at p. 1298, fn. 6.)

Reviewing both Justice Ginsberg's concurring opinion in the United States Supreme Court's 4-4-1 decision in *Montana v. Egelhoff* (1996) 518 U.S. 37 (*Egelhoff*), and the legislative history of section 22, the *Timms* court concluded that amended section 22 did not belong "to the prohibited category of evidentiary rules designed to exclude relevant exculpatory evidence." (*Timms, supra*, 151 Cal.App.4th at p. 1300.) Rather, the *Timms* court reasoned, given California's lengthy history of limiting the admissibility of voluntary intoxication and other capacity evidence for defensive purposes, amended section 22 " 'embodies a legislative judgment regarding the circumstances under which individuals may be held criminally responsible for their actions' " and is therefore constitutional. (*Timms, supra*, at p. 1300. See also *Egelhoff, supra*, 518 U.S. at p. 57 (conc. opn. of Ginsburg, J.).) It would serve no useful purpose to further quote from or paraphrase the *Timms* court's well reasoned opinion. Suffice to say we agree with its reasoning, and find it applies to the present case. Although defendant argues that *Timms* is distinguishable because in that case the issue arose in a murder trial, we find that to be

a distinction without a difference in this case. The instructions given in both *Timms* and this case required the jury to wrestle with the element of "conscious disregard" in the context of voluntary manslaughter. We hold that the trial court did not err in giving CALCRIM No. 625, and that instruction did not violate defendant's due process rights.

Defendant Was Not Entitled To An Instruction On Accident And Misfortune And Heat Of Passion Excusable Homicide.

Defendant argues that the jury should have been instructed along the lines that "if [he] did not know he had a knife, then he was entitled to a 'heat of passion' excusable homicide instruction, because the very fact that he had a knife in his hand was itself the result of accident or misfortune. This exact point has never been considered, in the context of Penal Code section 195, subdivision 2." As we shall explain, defendant was not entitled to such an instruction for a number of reasons.

Section 195 codifies the circumstances under which accident or misfortune will provide a defense to a homicide charge: "Homicide is excusable in the following cases: [¶] 1. When committed by accident and misfortune, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent. [¶] 2. When committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, when no undue advantage is taken, *nor any dangerous weapon used,* and when the killing is not done in a cruel or unusual manner." (Italics added.) Section 26, subdivision five, lists generally all categories of persons who lack criminal responsibility. One of those categories includes persons who commit acts by accident or misfortune. [20]

The jury in this case was instructed on section 195, subdivision 1. (CALCRIM No. 510.) Defendant did not request, and the jury was not instructed, on section 195,

[20] Penal Code section 26 provides in relevant part: "All persons are capable of committing crimes except those belonging to the following classes: [¶] . . . [¶] Five—Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence."

subdivision 2 (CALCRIM No. 511)[21] or section 26, subdivision five. (CALCRIM No. 3404.).[22] On appeal, defendant contends the jury should have been instructed with one or the other. Presumably, CALCRIM No. 3404 would have been more desirable than CALCRIM No. 511 because it does not contain the limitations of the homicide-specific instruction.

To the extent that either instruction may have been applicable, defendant's failure to request one or the other forfeits his claim under recent Supreme Court precedent. "Generally, the claim that a homicide was committed through misfortune or by accident 'amounts to a claim that the defendant acted without forming the mental state necessary to make his or her actions a crime.' [Citation.] In *People v. Saille*[, *supra*,] 54 Cal.3d

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[21] CALCRIM No. 511 provides in relevant part: "The defendant is not guilty of (murder/ [or] manslaughter) if (he/she) killed someone by accident while acting in the heat of passion. Such a killing is excused, and therefore not unlawful, if, at the time of the killing:

1. The defendant acted in the heat of passion;

2. The defendant was (suddenly provoked by <*insert name of decedent*>/ [or] suddenly drawn into combat by <*insert name of decedent*>);

3. The defendant did not take undue advantage of <*insert name of decedent*>;

4. The defendant did not use a dangerous weapon;

5. The defendant did not kill <*insert name of decedent*> in a cruel or unusual way;

6. The defendant did not intend to kill <*insert name of decedent*> and did not act with conscious disregard of the danger to human life;

AND

7. The defendant did not act with criminal negligence.

[¶] . . . [¶] [A *dangerous weapon* is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.]"

[22] CALCRIM No. 3404 provides in relevant part:

"<*General or Specific Intent Crimes*>

[The defendant is not guilty of <*insert crime[s]*> if (he/she) acted [or failed to act] without the intent required for that crime, but acted instead accidentally. You may not find the defendant guilty of <*insert crime[s]*> unless you are convinced beyond a reasonable doubt that (he/she) acted with the required intent.]"

1103, we held that evidence 'proffered in an attempt to raise a doubt on an element of a crime which the prosecution must prove beyond a reasonable doubt' may, but only upon request, justify the giving of a pinpoint instruction that 'does not involve a "general principle of law" as that term is used in the cases that have imposed a sua sponte duty of instruction on the trial court.' (*Id.* at p. 1120.) 'Such instructions relate particular facts to a legal issue in the case or "pinpoint" the crux of a defendant's case, such as mistaken identification or alibi. [Citation.] They are required to be given upon request when there is evidence supportive of the theory, but they are not required to be given sua sponte.' (*Id.* at p. 1119.)" (*People v. Jennings* (2010) 50 Cal.4th 616, 674–675 (*Jennings*). See also *People v. Anderson* (2012) 51 Cal.4th 989 (*Anderson*).)[23]

Second, there was no factual basis for an accident instruction based on subdivision 2 of section 195, or section 26, subdivision five, because the statutory defense making homicide excusable exists only if the defendant did not use a dangerous weapon. Here, defendant used a knife. His argument that the limitation under section 195, subdivision 2 does not apply if he did not "know" he was using a knife is unsupported by the facts. Defendant's own statement—on which he relies for this argument—established that he "knew" he was using a knife: he had been chopping garlic with it when Fluker came back into defendant's room and shoved him in the chest, causing defendant to react reflexively by hitting Fluker in the chest with the knife in his hand. He may have hit Fluker with the knife unintentionally, i.e., "by accident." But reflex is not the same as lack of knowledge.

[23] Until *Jennings, supra*, 50 Cal.4th 616, some courts applied the rule that a trial court is required to instruct sua sponte on any defense if "there is substantial evidence supporting the defense, and the defendant is either relying on the defense or the defense is not inconsistent with the defendant's theory of the case. (*People v. Sedeno* [1974] 10 Cal.3d [703] at p. 716.) If the defense is supported by the evidence but is inconsistent with defendant's theory of the case, the trial court should instruct on the defense only if the defendant wishes the court to do so." (*People v.Villanueva* (2008) 169 Cal.App.4th 41, 49.)

Finally, defendant cites no legal authority to support the proposition that section 195, subdivision 2 includes an unstated exception for the unintended or unknowing use of a deadly weapon. In *Anderson*, our Supreme Court rejected an analogous argument that accident could be a defense to robbery if the defendant used force or fear, but did not intend "to cause the victim to experience force or fear." (*Anderson, supra*, 51 Cal.4th at p. 995.) We see no basis for interpreting section 195, subdivision 2 other than exactly as written. The trial court did not err in failing to instruct the jury that defendant was not criminally responsible for a homicide if he used a deadly weapon, but did so "unknowingly."

Defendant's New Trial Motion Was Properly Denied.

On appeal, defendant renews his claim that a new trial should have been granted because the prosecution failed to timely turn over the police report relating to Sharon Bonnett's 2009 arrest. He asserts this discovery lapse constituted a due process violation under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) in that it prevented him from impeaching Bonnett's trial testimony with the facts underlying her 2009 arrest. He argues that "Bonnett's credibility was crucial to the outcome" of the trial, given that "[i]n the previous trial where Bonnett had not testified, there was a hung jury." As we explain below, having independently reviewed the record, we are not convinced the undisclosed information was material. Even if the 2009 arrest report had been disclosed to the defense in a timely fashion, and Bonnett had been impeached with its contents, we find no reasonable probability that the result of the trial would have been different. (*United States v. Bagley* (1985) 473 U.S. 667, 682; *Kyles v. Whitley* (1995) 514 U.S. 419, 433.) Therefore, there was no *Brady* violation, and the trial court correctly denied the new trial motion. To place our conclusion in context, we begin by setting forth the procedural facts pertinent to the nondisclosure of the 2009 arrest report.

Procedural Background

Several hearings outside the jury's presence were held on defense counsel's vociferous objections to the prosecution's revelation that he intended to call Sharon Bonnett as a rebuttal witness. At the hearing on Monday, October 4, 2010, the prosecutor

stated that he mistakenly believed the witness's surname was B-E-N-N-E-T, and when he first checked that name and the associated birth date for a criminal record, he found none, and told defense counsel so the previous Thursday. However, he subsequently learned her name was B-O-N-N-E-T-T. When he checked for criminal records pertaining to the correct name and birth date, he found that the witness had two prior felony convictions from 1993 and 1994 for drug offenses (Health & Safety Code §§ 11350, 11351.5), a prior misdemeanor conviction for theft in 1992, and a 2009 arrest that eventually resulted in a dismissal. The prosecutor delivered this information to the defense attorney on the previous Friday afternoon. However, he did not have an arrest report to give defense counsel for the 2009 incident.

In the meantime, defense counsel conducted her own criminal records check and discovered not only the felony convictions, but also a 2009 arrest for robbery, false imprisonment, domestic violence, battery and domestic violence corporal injury. She argued the arrest report might well reveal information that could be used for impeachment under *People v. Wheeler* (1992) 4 Cal.4th 284 (*Wheeler*), but she could not argue for admissibility of the evidence to the court, or effectively cross-examine Ms. Bonnett, without knowing what was in the arrest report, which she still did not have. She asked for exclusion of the witness or, alternatively, a late discovery instruction.

The court ruled the prosecutor could call Ms. Bonnett as a witness; the defense could impeach her with the two prior felony convictions; but the court was excluding the misdemeanor theft and the 2009 arrest for a dismissed robbery as "more prejudicial than probative." Following more argument, the court again ruled that since there was no conviction stemming from the charges, the evidence would be excluded "unless she opens the door somehow while she's on the stand." The court re-affirmed its prior ruling the next day. When the prosecutor asked Ms. Bonnett if she had "changed as a person since" her earlier convictions, she explained that she had, notwithstanding the "conflict" with her son's father that occurred the previous year.

Defense counsel requested a side bar discussion, after which the prosecutor invited Ms. Bonnett to elaborate upon the "situation that happened with your son last year." She

said her son's father had her paycheck and wouldn't give it back. She was accused of robbing him and she got in trouble and went to jail for five days, but she was never convicted. On cross-examination, defense counsel asked no questions about the 2009 arrest. The court later indicated that after the witness had "opened the door" in her testimony, the court "allowed both sides to question her about it."

The arrest report relating to Ms. Bonnett's 2009 arrest was not disclosed to the defense until after the conclusion of the trial. Defendant's new trial motion based on the late disclosure of the report was argued and denied March 1, 2011. The court ruled that Ms. Bonnett's testimony was helpful, but not central to the prosecution case. Noting that the prosecution case included a taped interview of the defendant, among other evidence, the court concluded that even if the defense had been allowed to impeach Ms. Bonnett with the 2009 arrest report, it would not have affected the outcome of the case viewed in the context of the entire record of the trial.

The Arrest Report

The report includes statements from all of the participants in the affray, as well as from a security guard witness. Their statements were largely in agreement with each other.

Bonnett and Holland are the parents of a then 12-year-old son. Holland, recently paroled from prison, had been staying at Bonnett's home. On February 13, 2009, Bonnett spent the night with her boyfriend, Washington, at his place. The next morning she called Holland and asked him to bring her paycheck to the Transbay Terminal.

Bonnett and Holland met while Washington waited across the street. Holland had her paycheck, but he told Bonnett that he didn't have it, in order to get her to go back to her home with him. An argument ensued. Washington joined them. Security guard Jones witnessed Washington punching Holland, with Bonnett holding on to Holland, and heard Bonnett say, "You're going to give me my check!" He never saw a box cutter.

Bonnett grabbed Holland to keep him from running away with the check. Washington punched Holland while Bonnett went through his pockets looking for the check. According to Holland, Bonnett took $13 from a pocket. Bonnett denied this.

Holland's cell phone fell out of his pocket. According to Holland, Washington threatened to cut Holland with a box cutter if he did not turn over the paycheck. Bonnett told Washington to stop punching Holland and not to cut him. Holland yelled for help while he moved closer to other people waiting on the platform, with Bonnett still clinging to Holland by the waistband of his pants. When the police were called, Washington threw the box cutter into a trashcan. Washington denied threatening Holland with the box cutter.

Holland's cell phone and $13 were recovered from Washington's pockets. Bonnett's paycheck was recovered from Holland's sock. The box cutter was recovered from the trashcan.

Standard of Review

"Conclusions of law or of mixed questions of law and fact, such as the elements of a *Brady* claim [citation], are subject to independent review. [Citation.] Because the [trier of fact] can observe the demeanor of the witnesses and their manner of testifying, findings of fact, though not binding, are entitled to great weight when supported by substantial evidence." (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042 (*Salazar*).)

Analysis

"In *Brady*, the United States Supreme Court held 'that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' [Citation.] The high court has since held that the duty to disclose such evidence exists even though there has been no request by the accused [citation], that the duty encompasses impeachment evidence as well as exculpatory evidence [citation], and that the duty extends even to evidence known only to police investigators and not to the prosecutor [citation]. Such evidence is material ' "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." ' [Citation.] In order to comply with *Brady*, therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known

to the others acting on the government's behalf in the case, including the police.' [Citations.]" (*Salazar, supra*, 35 Cal.4th at p. 1042.)

" '[T]he term "*Brady* violation" is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence—that is, to any suppression of so-called "*Brady* material"—although, strictly speaking, there is never a real "*Brady* violation" unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.' [Citation.] Prejudice, in this context, focuses on 'the materiality of the evidence to the issue of guilt and innocence.' [Citations.] Materiality, in turn, requires more than a showing that the suppressed evidence would have been admissible [citation], that the absence of the suppressed evidence made conviction 'more likely' [citation], or that using the suppressed evidence to discredit a witness's testimony 'might have changed the outcome of the trial' [citation]. A defendant instead 'must show a "reasonable probability of a different result." ' [Citation.]" (*Salazar, supra*, 35 Cal.4th at pp. 1042–1043.)

In this case, defendant has shown the contents of the arrest report were potentially impeaching, and that the report was at least inadvertently suppressed by the state. But defendant cannot surmount the prejudice hurdle merely by showing that Ms. Bonnett did not testify at the first trial.

It is true that misconduct not resulting in a felony conviction may be admissible to impeach credibility if it involves moral turpitude, because such conduct bespeaks a willingness to lie or a readiness to do evil. (*Wheeler, supra*, 4 Cal.4th at pp. 295–296.) Presumably, by seeking to impeach Bonnett with her prior arrest for robbery and other crimes, defendant sought to show that Bonnett's testimony about the friendly encounter between defendant and Fluker over the coat was not true, because her arrest showed a willingness to lie. But even if admissible, "the latitude [Evidence Code] section 352

allows for exclusion of impeachment evidence in individual cases is broad. The statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." (*Wheeler*, *supra*, at p. 296.)

In this case, without having to review the arrest report, the trial court made a decision that evidence about the 2009 incident would be more prejudicial than probative. The dismissal of the case based on the arrest weakened the inference of moral turpitude and, therefore, its probative value. On the other hand, bringing in live witnesses to testify about the incident, or engaging in extensive cross-examination of Ms. Bonnett about it, for the purpose of suggesting that Bonnett invented the encounter between defendant and Fluker, had the potential to be both time consuming and distracting. The court did not abuse its discretion in excluding such impeachment on a collateral credibility issue on the ground it involved undue time, confusion, or prejudice under Evidence Code section 352.

Moreover, the details of the incident, even if admissible, did not particularly contradict Ms. Bonnett's testimony about the incident, further weakening the probative value of such evidence. Bonnett and Holland did have a son together; Holland did have her paycheck, and he would not give it to her voluntarily; she did get in trouble, and she was accused of robbing Holland; but she was not convicted of robbing him.

The police report adds only that another person, her boyfriend Washington, was involved in a fight with Holland. Bonnett did not hit Holland; Washington did. By clinging to Holland's pants, Bonnett arguably may have aided and abetted Washington's battery of Holland, although Bonnett implored Washington to stop hitting Holland, and told Washington not to cut Holland. And, while Holland believed that Bonnett took $13 out of one of his pockets while searching for her paycheck, Washington admitted picking up the money off the ground and it was found in his, not Bonnett's, possession. In our view, the impeaching force of the evidence is minimal. We conclude that "the undisclosed information concerning her [] criminal matters would not have undermined her credibility to any significant degree." (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 177 (*Letner*).) Furthermore, Bonnett's credibility was impeached by her two prior

felony convictions, which already provided the jury with a basis for disbelieving Bonnett's testimony.

Defendant argues that his self-defense claim depended on evidence of Fluker's larger size and violent character, and defendant's fear of him. He claims that Bonnett's testimony "changed that analysis," because it enabled the jury to draw the inference that if defendant had been "willing to jokingly demand a dollar to hold Fluker's coat for him, then it was unlikely that he was afraid of Fluker," and that he stabbed Fluker not in fear of him, but "because he was so annoyed with Fluker that his self-control vanished." We disagree.

Substantial evidence supports the trial court's factual conclusion that while Bonnett's testimony about the seemingly friendly encounter between defendant and Fluker approximately an hour and a half before the stabbing was helpful, it was not central to the prosecution's case. Bonnett's testimony did not introduce a new perspective on defendant's relationship with Fluker. In defendant's statement to the police—the most powerful evidence against defendant—he admitted that he and Fluker were sometimes friends. In fact, he said they were "like brothers." But Fluker also got on his nerves, ate all his food and took advantage of his hospitality, and defendant put Fluker on the 86 list of *personas non grata* at the hotel. Despite this fact, defendant allowed Fluker to visit now and then, and store his personal belongings in defendant's room.

Several defense witnesses testified that Fluker was violent. Lajuana Ceasar had heard Fluker threaten defendant and seen Fluker "snatch and pull" at him. She had also seen them hanging out together and being very friendly. Carita McKinley reported that Fluker "was using intimidation to get what he wanted from [defendant] and [defendant] was afraid of him." She also testified that defendant could be hostile, aggressive or disrespectful on occasion. In short, the record as a whole showed that both Fluker and defendant were volatile and unpredictable people who were alternately friendly and angry with each other, but that defendant was fearful of and intimidated by Fluker at times. Even without Bonner's testimony, the jury would have been entitled to conclude from all

of the evidence presented that defendant's fearfulness of Fluker was not the operative motivation for the stabbing.

" 'In general, impeachment evidence has been found to be material where the witness at issue "supplied the only evidence linking the defendant(s) to the crime" [citations], or where the likely impact on the witness's credibility would have undermined a critical element of the prosecution's case.' " (*Salazar, supra*, 35 Cal.4th at p. 1050; *Letner, supra*, 50 Cal.4th at p. 177.) The first circumstance is obviously not satisfied here and neither is the second. No *Brady* violation occurred.

CONCLUSION

Collateral estoppel does not apply in this case. The trial court did not misinstruct the jury. The court properly denied defendant's new trial motion.

DISPOSITION

The judgment is affirmed.

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Marchiano, P.J.

We concur:

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Margulies, J.

_____
Banke, J.